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No. 96-1712

In the

Supreme Court of the United States

October Term, 1996

Dionne Staples,
Petitioner,

v.

Michael P. Kelly and John T. Kelly,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE NATIONAL FAIR HOUSING ALLIANCE AND TOLEDO FAIR HOUSING CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEPHEN MARK DANE *Counsel of Record*
MICHAEL L. STOKES
COOPER, WALINSKI & CRAMER
900 Adams Street
Toledo, OH 43603
Telephone 419-241-1200
Telecopier 419-242-9606
Counsel for Amici Curiae

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO 216-621-5647

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, the National Fair Housing Alliance and The Fair Housing Center, Toledo, Ohio, sought permission from all parties to this action to file a brief in support of certiorari as *amici curiae*. The Acting Solicitor General, on behalf of the Secretary of the United States Department of Housing and Urban Development, respondent below, and Dionne Staples, one of the petitioners below, have granted consent. Copies of the letters granting consent have been filed with the Clerk.

Michael P. Kelly and John T. Kelly, also petitioners below, have withheld consent. Therefore, the National Fair Housing Alliance and The Fair Housing Center, Toledo, Ohio, respectfully move the Court for leave to file a brief, as *amici curiae*, in support of Dionne Staples' petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit that was entered in this proceeding.

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation that represents private fair housing centers throughout the United States. NFHA assists private fair housing centers by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, and sponsoring national education conferences on fair housing issues and fair housing litigation. NFHA regularly participates as an *amicus curiae* in cases that involve important interpretations of fair housing laws.

The Toledo Fair Housing Center (the Center) is an operating member of the National Fair Housing Alliance. The Center works to eliminate practices of housing discrimination and to expand equal housing opportunities in Northwestern Ohio through efforts that include fair housing enforcement and litigation.

In this case, an issue has arisen as to whether a court of appeals may reduce an administrative law judge's award of actual damages to a Fair Housing Act complainant because the Department of Housing and Urban Development did not proceed in compliance with the time limits set forth in the Act, 42 U.S.C. § 3601 *et seq.* This issue is of particular concern to NFHA and its members, including the Center, because the appeals court's decision will affect the choice of forum for claims filed under 42 U.S.C. § 3610, and because it will likely have important precedential value for similar cases in other jurisdictions. If the decision is not reversed, private fair housing organizations like the Center and other NFHA members will need to counsel aggrieved persons to have their claims judicially determined, rather than decided in the administrative forum established by the Fair Housing Amendments Act, to ensure that their actual damage awards are not reduced because of administrative delays over which they have no control. This result will thwart one of Congress's primary purposes in passing the Fair Housing Amendments Act, namely, "to provide ...effective enforcement ...by creating an administrative enforcement system." H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N.2173, 2174.

As national and regional organizations with specific interests in fair housing enforcement, NFHA and the Center have a view of the administrative consequences of the appeals court's decision that might differ from that of

the petitioner, Dionne Staples, and which might not be presented in its entirety in the petitioner's brief. Therefore, NFHA and the Center respectfully move for leave to file a brief with the Court, as *amici curiae*, to demonstrate that this issue merits review on certiorari.

QUESTIONS PRESENTED

1. Does a federal court of appeals err when it interprets the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.*, to include a twelve month limit on the accrual of damages for a claim filed in an administrative proceeding?

2. Does a federal court of appeals exceed its permitted scope of review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, when it reduces an administrative law judge's finding of actual damages without showing that the finding was unsupported by substantial evidence on the record as a whole?

3. Does a federal court of appeals exceed its permitted scope of review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, when it reduces an administrative law judge's award of remedial damages in order to shift the cost of an administrative delay from the discriminators to the person aggrieved by an act of unlawful discrimination?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Dionne Staples, the respondents Michael P. Kelly and John T. Kelly, and the Secretary, United States Department of Housing and Urban Development.

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1996

DIONNE STAPLES, *Petitioner*,

v.

MICHAEL P. KELLY and
JOHN T. KELLY, *Respondents*.

BRIEF OF *AMICI CURIAE* THE NATIONAL FAIR HOUSING ALLIANCE AND TOLEDO FAIR HOUSING CENTER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The National Fair Housing Alliance and The Fair Housing Center, Toledo, Ohio, as *amici curiae*, respectfully urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1996 (petition for rehearing and suggestion for rehearing *en banc* denied January 24, 1997).

INTERESTS OF THE *AMICI CURIAE*

The National Fair Housing Alliance, Inc. (NFHA) is a non-profit corporation organized under the laws of Virginia that represents private fair housing centers throughout the United States. NFHA's purpose is the achievement of "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. §3601. It attempts to fulfill this purpose by conducting research into the nature and effects of housing discrimination, advocating for effective programs of fair housing compliance enforcement, and sponsoring national education conferences on fair housing issues and fair housing litigation. NFHA also attempts to identify and eliminate housing practices that are discriminatory and that constitute barriers to equal access to housing. NFHA has a direct interest in the construction and application of federal statutes protecting against discrimination in housing. To this end, NFHA seeks leave to participate as *amicus curiae* in those cases that involve important interpretations of fair housing laws.

The Toledo Fair Housing Center (the Center) is an operating member of the National Fair Housing Alliance. Organized in 1975, the Center is a private, nonprofit organization that works to eliminate practices of housing discrimination and to expand equal housing opportunities in Northwestern Ohio. The Center is a leader in fair housing enforcement and litigation. Its staff has conducted workshops for fair housing organizations, government agencies, and housing industry professionals. The Center is regularly called upon by Congress to submit testimony regarding discriminatory housing practices. Like NFHA, the Center has a direct interest in the construction and application of the Fair Housing Act.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit for which *amici* urge review on certiorari is reported at 97 F.3d 118. The first opinion of the Sixth Circuit in this matter, which is also relevant, is reported at 3 F.3d 951. The initial decision and initial decision on remand of the Department of Housing and Urban Development, Office of Administrative Law Judges, have not been reported. These opinions and decisions are attached as appendices to the Petition for Writ of Certiorari filed by petitioner Dionne Staples.

JURISDICTION

Invoking the jurisdiction of the Court of Appeals for the Sixth Circuit under 42 U.S.C. § 3612(i), the Kellys appealed the judgment of the Department of Housing and Urban Development, Office of Administrative Law Judges, in its decision on remand from a previous appeal. See Pet'r Br., pp. A2 and B17. In a judgment decided September 30, 1996 the Sixth Circuit reversed and modified the damage award made by the administrative law judge. See Pet'r Br., p. A2. The Secretary of the Department of Housing and Urban Development and petitioner Dionne Staples each filed a petition for rehearing and suggestion for rehearing *en banc* that the court denied on January 24, 1997. See Pet'r Br., p. E109-110.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

...

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 3610. Administrative enforcement; preliminary matters

(a) Complaints and answers

(1)(A)(i) An aggrieved person may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint with the Secretary alleging such discriminatory housing practice. The Secretary, on the Secretary's own initiative, may also file such a complaint.

...

(g) Reasonable cause determination and effect

(1) The Secretary shall, within 100 days after the filing of the complaint ...,determine based on the facts whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, unless it is impracticable to do so, or unless the Secretary has approved a conciliation agreement with respect to the complaint. If the Secretary is unable to make the determination within 100 days after the filing of the complaint ...,the Secretary shall notify the complainant and respondent in writing of the reasons for not doing so.

(2)(A) If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary shall, except as provided in subparagraph (C), immediately issue a charge on behalf of the aggrieved person, for further proceedings under section 3612 of this title.

42 U.S.C. § 3612. Enforcement by the Secretary

(b) Administrative law judge hearing in absence of election

If an election is not made under subsection (a) of this section with respect to a charge filed under section 3610 of this title, the Secretary shall provide an opportunity for a hearing on the record with respect to a charge filed under section 3610 of this title. The Secretary shall delegate the conduct of a hearing under this section to an administrative law judge appointed under section 3105 of Title 5. The administrative law judge shall conduct the hearing at a place in the vicinity in which the discriminatory housing practice is alleged to have occurred or to be about to occur.

...

(g) Hearings, findings and conclusions, and order

...

(3) If the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent--

...

(i) Judicial review

(1) Any party aggrieved by a final order for relief under this section granting or denying in whole or in part the relief sought may obtain review of such order under chapter 158 of Title 28.

(2) Notwithstanding such chapter, venue of the proceeding shall be in the judicial circuit in which the discriminatory housing practice is alleged to have occurred ....

STATEMENT OF THE CASE

On March 5, 1990 petitioner Dionne Staples inquired about an apartment that respondents offered for rent and was told that she did not qualify for the rental because she had too many children. On May 17, Ms. Staples filed a complaint with the Department of Housing and Urban Development (HUD) alleging that respondents had violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* HUD investigated the complaint and decided there was reasonable cause to believe that discriminatory acts had taken place. During 1990, HUD made several offers to conciliate the complaint. On March 2, 1992 HUD issued a Charge of Discrimination against the respondents. An oral hearing was held May 27-29, 1992.

On August 26, 1992 the administrative law judge issued an initial decision. The judge found that Ms. Staples had suffered economic damages of $6,930.76,which consisted of increased alternative housing costs and associated transportation costs. The judge also found that Ms. Staples had suffered $3,500 in actual intangible damages for emotional distress and for the loss of the features of the rental property that were of particular and uncommon value to her. Finally, the judge decided against

imposing a civil penalty, in part because HUD had failed to present the case for adjudication during the time period contemplated by the Act while Ms. Staples's economic damages had continued to accrue after that period had elapsed. See Pet'r Br., pp. C61, C76-78.

Respondents appealed. In its first review of the administrative order, the Sixth Circuit expressed strong dissatisfaction with what it considered to be procedural lapses and inadequate conciliation efforts on the part of HUD. Although upholding the administrative law judge's finding of discrimination, and noting that the judge had taken HUD's delay into account by declining to assess a civil penalty, the court vacated the judge's award of actual damages and remanded the case to the Department for further conciliation. If conciliation were to fail, the court directed the administrative law judge to reconsider his opinion, directing that "in no case should damages be assessed for the period during which HUD completely neglected this case." See Pet'r Br., p. B34.

Conciliation failed. Upon remand,the administrative law judge determined that only economic damages were at issue because the remaining damages, which represented emotional distress and loss of housing opportunity, would have occurred no matter when the hearing took place. Seeking to apply the Sixth Circuit's directive that no damages should be assessed for any period in which HUD "completely neglected" the case, the judge tried to determine whether the Sixth Circuit intended to apply the time limits of the Fair Housing Amendments Act as a limitation on the accrual period for damages. Examining the text of the Act, the judge noted that it required HUD to issue a Charge of Discrimination within 100 days of the filing of the complaint "unless it is impracticable to do so." 42 U.S.C. § 3610(g). The judge reasoned that this period

could not be a limit on the accrual period for damages, because the Act contemplated situations in which compliance would be "impracticable." See Pet'r Br., pp. D92-98.

The judge also observed that HUD, in its regulations, had construed "impracticable" to include situations where the size of the overall caseload prevented timely processing of a case. Citing to this Court's decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979) for the proposition that HUD's regulatory interpretation of the Act "commands considerable deference" because HUD has primary responsibility for administering the Act, the judge found HUD's construction of "impracticable" to be reasonable and permitted by the statute. Noting that HUD had argued on remand that the size of its caseload prevented timely processing of the case, the judge determined that the situation could fit within the "impracticable" exception to the Act's time limits. See Pet'r Br., pp. D94-95. The judge also noted that if he were to interpret those time limits to prohibit accrual of damages after 100 days, respondents would gain a windfall, because they had already escaped imposition of a civil penalty due to those same delays. After carefully reexamining the record, the judge found that he could not identify any period during which HUD had "completely neglected" the case, and therefore reduced the damages award by a nominal $1.

Respondents appealed again. Without any discussion of the facts or citation to the record, the Sixth Circuit reduced the accrual period for Ms. Staples' economic damages to twelve months, which it deemed to be "the period within which Congress intended HUD to carry out its administrative responsibilities." See Pet'r Br., p. A6. The court also reduced Ms. Staples' damages for

emotional distress and loss of housing opportunity despite the administrative law judge's finding that those damages did not depend on an accrual period.

REASONS FOR GRANTING THE WRIT

I.

The Sixth Circuit's decision to impose a twelve month limit on the accrual of damages, and to reduce the actual damages awarded in an administrative proceeding, because the Department of Housing and Urban Development failed to comply with the time limits set forth in the Fair Housing Amendments Act, conflicts with that Act and with decisions of other Circuits applying the Administrative Procedure Act.

When it enacted the Fair Housing Amendments Act of 1988, Congress sought to "fulfill the promise made ... by the enactment of title VIII of the Civil Rights Act of 1968." H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174. Congress recognized that the 1968 Act failed to provide an effective enforcement mechanism that would make its proscription of discriminatory housing practices a reality. *Id.*

To correct that shortcoming, Congress created an administrative enforcement system that empowered the Department of Housing and Urban Development to bring a discriminatory housing practice case to a hearing before an administrative law judge. *Id.* at 2174, 2178. Congress provided that the hearing would be conducted on the record, in accordance with the Administrative Procedure

Act. 42 U.S.C. § 3612(b); H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N.2173, 2197. If the hearing shows that the respondent had engaged in a discriminatory housing practice, the Fair Housing Amendments Act requires the administrative law judge to promptly issue an order for appropriate relief. 42 U.S.C. § 3612(g)(3). If the aggrieved person suffered actual damages, the order must include an award of actual damages in the amount proven.[1] In the administrative law judge's discretion, the order could also assess a civil penalty against the respondent.

Once the order becomes final, the Act permits an appeal to the court of appeals for the judicial circuit in which the discriminatory housing practice allegedly occurred. 42 U.S.C. § 3612(i). Congress intended the order and the scope of appeal to be governed by the Administrative Procedure Act, under which the court of appeals could not set aside findings of fact unless they were unsupported by substantial evidence on the record taken as a whole. H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, *reprinted in* 1988 U.S.C.C.A.N.2173, 2199; see also *HUD v. Blackwell*, 908 F.2d 864, 870 n.2 (11th Cir.

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[1] The literal terms of the Fair Housing Amendments Act provide that the order "may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). Prior to its amendment, similar language in the Fair Housing Act provided that a court "may award to the plaintiff actual damages." *Curtis v. Loether*, 415 U.S. 189, 190-91 (1974), *quoting* Section 812 of the Civil Rights Act of 1968. Interpreting that language, this Court determined that an award of actual damages was not discretionary: "if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." *Id.* at 198.

1990); 5 U.S.C. § 706.[2] Like a finding of unlawful discrimination, the determination of actual damages is a question of fact that is reviewed in accordance with the "substantial evidence" standard. *Morgan v. HUD*, 985 F.2d 1451, 1458 (10th Cir. 1993); *HUD v. Blackwell*, 908 F.2d 864, 872-73 (11th Cir. 1990).[3]

The Sixth Circuit's decision below conflicts with the Administrative Procedure Act and decisions of this Court and other Circuits and threatens to disrupt the entire system of administrative enforcement that Congress established in the Fair Housing Amendments Act. Under the Administrative Procedure Act and applicable precedent, an administrative award of actual damages must be upheld if it is supported by substantial evidence. Substantial evidence is "such relevant evidence as a

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[2] Each court of appeals that has considered the issue has determined that administrative adjudications of Fair Housing Act claims must be reviewed in accordance with the deferential standards of the Administrative Procedure Act. See, e.g., *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995); *Morgan v. HUD*, 985 F.2d 1451, 1457 (10th Cir. 1993), also citing *Arkansas v. Oklahoma*, 503 U.S. 91, 112-13 (1992); *Soules v. HUD*, 967 F.2d 817, 821-22 (2nd Cir. 1992); *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990). The Court of Appeals for the Sixth Circuit appears to have implicitly recognized this standard of review. See *Baumgardner v. HUD*, 960 F.2d 572, 579 (6th Cir. 1992).

[3] Apart from awarding actual damages, agencies are given considerable latitude in the selection of other remedial measures. This Court has held that an agency's selection of remedy should not be overturned unless it is either "'unwarranted in law or ... without justification in fact.'" *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973), quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946). See also *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1294 (D.C. Cir. 1996) (following *Butz*).

reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). As this Court recently declared, a reviewing court may not "supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence." *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). Yet despite the clarity of this command, in its review of the administrative law judge's findings in the case below, the Sixth Circuit arbitrarily limited the accrual period of damages to twelve months. Judge Ryan strongly dissented, stating "[t]here is absolutely nothing in the record to support 'twelve months' as the appropriate period for a damage award and, to its credit, the majority does not claim there is any record support for what it has done." See Pet'r Br., p. A13.

The Sixth Circuit justified its disregard of the factual record and the administrative finding of damages by stating, apparently as a legal conclusion, that twelve months is "the period within which Congress intended HUD to carry out its administrative responsibilities." See Pet'r Br., p. A6. That statement is incorrect. Congress did specify that HUD, or an aggrieved person seeking administrative enforcement by HUD, must file a *complaint* within twelve months of the occurrence or termination of a discriminatory housing act. 42 U.S.C. § 3610(a)(1)(A)(i). But Congress also specified that HUD would have continued administrative responsibilities after that twelve month period: for example, unless impracticable, HUD was expected to make a reasonable cause determination within 100 days after the filing of the complaint and, if warranted, to issue a charge of discrimination to institute adjudicatory proceedings. 42 U.S.C. § 3610(g)(1).

Moreover, the statutory language does not command that proceedings must be instituted within a fixed time. Rather, it permits HUD to extend the time for filing a charge if earlier action would be "impracticable." In its regulations, HUD has construed this exception to include situations where the size of its overall caseload prevented timely processing of a case. 24 C.F.R. Subtitle B, Ch. I, Subch. A., App. I (1994) (discussion of § 103.225, *Completion of investigation*, in the final rule implementing the Fair Housing Amendments Act of 1988). As this Court has emphasized, HUD's regulatory interpretation of the Fair Housing Act "commands considerable deference" because HUD has primary responsibility for administering the Act. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979).

By interpreting the Act to require administrative disposition of claims within twelve months, the Sixth Circuit completely disregarded HUD's prior interpretation of the Act, which permitted proceedings to be deferred when earlier adjudication would be impracticable due to HUD's overall caseload. In so doing, the court exceeded its allowed scope of judicial review under the Administrative Procedure Act and impermissibly interfered with HUD's administrative discretion.

More importantly, by interpreting the Act to prohibit accrual of damages in an administrative proceeding after twelve months, the Sixth Circuit created new law that conflicts with the purposes of the Fair Housing Amendments Act.[4] To obtain the protection of

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[4] The insupportability of the court's imposition of a twelve-month accrual period is reinforced by the fact that Congress provided for a *longer* statute of limitations in the Fair Housing Amendments (continued...)

a two year statute of limitations and avoid the prospect of reductions in damages due to administrative delays, private fair housing centers will therefore need to counsel aggrieved persons to bypass the Act's administrative forum and have their claims judicially determined instead. This result directly contravenes Congress' purpose in enacting the Fair Housing Amendments Act.

II.

The Sixth Circuit's decision to reduce the actual damages awarded in an administrative proceeding, because the Department of Housing and Urban Development failed to comply with the time limits set forth in the Fair Housing Amendments Act, conflicts with a decision of this Court applying the Administrative Procedure Act.

The Sixth Circuit stated that its reduction of the actual damages awarded by the administrative law judge "follow[ed] the mandate" of the first *Kelly* appellate decision: "that a respondent in a housing discrimination case cannot be made to pay for the government's neglect."

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[4](...continued)
Act, increasing the time for a private person to file a complaint from 180 days to two years and for HUD to file a complaint from 180 days to one year. 42 U.S.C. § 3613(a)(1)(A); H.R. Rep. No. 711, 100th Cong., 2d Sess. 38, reprinted in 1988 U.S.C.C.A.N.2173, 2194, 2200. Compare *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1339 (5th Cir. 1979) (interpreting the ADEA; "If Congress had thought a time lag of nineteen months to be unfair, it could have shortened the time for bringing an action under the Act").

See Pet'r Br., pp. A5-A6. That "mandate" squarely conflicts with this Court's decision in *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969).

In *Rutter-Rex*, this Court considered whether an administrative agency had the discretion, under the Administrative Procedure Act, to require a respondent to bear the cost of increased restitution caused by the agency's delay. *Id.* at 264-65. Finding that the agency did have such discretion, this Court noted that the agency "could properly determine that back pay is ... a remedy designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act," and concluded that "the Court of Appeals exceeded the narrow scope of review provided for the [agency's] remedial orders when it shifted the cost of the delay from the company to the employees in this case." *Id.* at 265-66.

In the present case, the administrative law judge plainly acted within the scope of agency discretion under *Rutter-Rex* when he decided to award remedial damages for the period that began with Dionne Staples' economic injury and ended with the hearing, but declined to assess a civil penalty in order to offset the increased damages respondents owed because the hearing did not occur within the time indicated in the Fair Housing Amendments Act. In so ruling, the judge fulfilled the purpose of the Fair Housing Act; namely, to ensure that a person wronged by unlawful discrimination obtained a judgment for actual damages. See *Curtis v. Loether*, 415 U.S. 189, 197 (1974). As this Court has said elsewhere, "the relation of remedy to policy is peculiarly a matter for administrative competence." *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973), quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 112-13 (1946).

By exceeding its permitted scope of review and imposing upon the text of the Fair Housing Amendments Act a novel and insupportable accrual period for damages, the Sixth Circuit has created a precedent that undermines the very purposes of the Act and directly conflicts with this Court's ruling in *Rutter-Rex*. Apart from being "an unedifying exercise in unrestrained judicial power," see Pet'r Br., p. A20, the Sixth Circuit's opinion in this case is the first opinion to address the problem of administrative delay under the Act. As a decision of first impression, it is likely to be followed by other Circuits that may well be confronted with similar instances of delay.[5] Plenary consideration of the matter by the Court is therefore essential.

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[5] In a 1993 article on the subject, Professor Leland Ware noted that "[t]he addition of two new protected categories ...has resulted in a considerable increase in HUD's caseload [and has] slowed the processing of fair housing complaints to such an extent that only a fraction are processed within the one hundred day maximum allotted by the statute." Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59, 63 (1993).

CONCLUSION

For the reasons set forth above, the petition for certiorari of Dionne Staples should be granted.

Respectfully submitted,

STEPHEN MARK DANE
Cooper, Walinski & Cramer
900 Adams Street
Toledo, OH 43603
(419) 241-1200
Counsel of Record
for Amici Curiae

MICHAEL L. STOKES
Cooper, Walinski & Cramer
900 Adams Street
Toledo, OH 43603
(419) 241-1200
Counsel for Amici Curiae

April 24, 1997